

THE HON'BLE SRI JUSTICE A. GOPAL REDDY

W.P.NO.20505 OF 1994

ORDER:

This writ petition is filed seeking a writ in the nature of *mandamus* declaring the action of the first respondent-Andhra Pradesh State Financial Corporation (APSFC) in seizing the cement industrial unit of the petitioner on 30.04.1992 and seeking its transfer by conducting sale, by calling tenders, as unconstitutional and arbitrary.

The brief facts, which are necessary for disposal of the writ petition, are as follows:

The petitioner is a company incorporated as per the provisions of the Indian Companies act, 1956. It is stated that Mr. S. Joga Rao being the Managing Director and Chief Promoter along with another individual viz. D. Harinayarayana Rao, approached Industrial Development Bank of India (IDBI) for seed capital assistance and APSFC for term loan and soft loan, in April 1984, for the purpose of establishing a cement factory. IDBI approved the project in August 1986, with promoter's equity of Rs.7 lacs and with project cost of Rs.75 lacs. The plant was designed to manufacture white cement. The total cost of the machinery was estimated at around Rs.43 lacs and accordingly the working capital required was assessed to be Rs.15 lacs of which margin money is Rs.3,90,000/-. APSFC, after approving the plan, released the first installment i.e. 25% of the sanctioned loan which would come to Rs.12.50 lacs, on 22.07.1987, and the petitioner commenced the civil works for pre-heater, silos, raw mill etc. Out of the said amount, Rs.6 lacs was paid towards machinery advance.

In September 1987, IDBI advised APSFC to stop disbursement of the amount, by entertaining a doubt as to the utilization of the funds, based on a mischievous letter written by one of the promoters. Subsequently, APSFC conducted inspection and ordered release of funds for implementation of project and accordingly sanctioned additional loan of Rs.6.60 lacs in July, 1988, duly reducing the promoter's equity from Rs.7 to 5 lacs. The first installment of seed capital and soft loan amounting to Rs.3.5 lacs was released and subsequently

in March 1989, balance of the seed capital and soft loan was disbursed. Later, APSFC put up a note that there can be over-run of expenditure and as a consequence stopped disbursement of further loan amount. However, after negotiations that took place in between the petitioner and the Corporation, the Corporation sanctioned term loan and soft loan from IDBI seed capital, cyclone relief fund etc. Subsequently, the officials of Corporation advertised the unit and put the same for sale. Hence, the writ petition.

In the counter-affidavit filed by the Corporation, it has been stated that after availing the loans, the petitioner constructed the building and acquired the machinery, which was not erected and kept idle in the factory premises. Since the petitioner failed to implement the project even after lapse of eight years from the date of sanction and became sick during implementation stage itself, the project was decided to be put for sale. As on the date of seizure, the outstanding balance of the loan amount was worked out at Rs.84,37,925-90 Ps.. The Corporation found that the promoters of the company are not solvent and are also not in a position to raise funds required for running the industry nor they could induct new directors, who are financially sound, to bring the fresh capital. The machinery was kept ideal for several years and the same was exposed to vagaries of weather resulting in deterioration of its value by leaps and bounds. Keeping this in mind, the Corporation resorted to action under Section 29 of the State Financial Corporation Act, 1951 (for short 'the Act'). Subsequently, the Corporation had advertised the assets of the petitioner unit for sale on 04.11.1992 and 17.01.1993. Since, there was no proper response, the Corporation re-advertised the sale in various newspapers like Hindu and Eenadu, giving wide publicity and the opening of the tenders was to take place on 22.01.1994 at 02.00 p.m. Pursuant to the said advertisement, tenders have been received by the Corporation ranging from Rs.18 to Rs.27 lacs. At the stage of finalization, negotiations were held, wherein Mr. Nagaraju enhanced his offer from Rs.33 to Rs.33.75 lacs with 35% down payment and the balance to be treated as loan payable within three years. The total value of the assets was estimated at Rs.26.50 lacs. The enhanced offer made by Nagaraju to purchase the assets of the petitioner for Rs.33.75 lacs has been accepted by the Corporation, subject to result of the writ petition, vide letter No. 4921 dated 25.01.1995. Accordingly, the purchaser paid a sum of Rs.11,81,250/- being 35% of the total sale consideration and the remaining 65% was treated as loan.

On purchaser completing all the formalities, the unit was handed over and the assets were delivered to him.

Sri Vedula Venkata Ramana, learned counsel for the petitioner, taking inspiration from the Judgment of the Supreme Court in *Gajraj Jain v. State of Bihar*, contends that Section 29(1) of the Act enables the Corporation to transfer the unit by way of lease or sale and realize the property pledged, mortgaged, hypothecated or assigned to the financial Corporation. According to him, the sale must be absolute but not an installment one. Learned counsel submits that in the absence of any power vested with the Corporation to sell the unit by granting loan to the purchaser, the so-called sale in favour of Nagaraju is in statutory violation of Section 29(1)(4) of the Act. He also submits that the conduct of sale is unreasonable, unfair, which can infer all *mala fides* and malicious action in law. Learned counsel further argues that once the writ petition is filed questioning the seizure and subsequent sale, which is subject to the result of the writ petition, non-impleadment of the subsequent purchaser will not deprive the petitioner of the relief for which it is entitled to.

Repudiating the above submissions, learned counsel for the respondent-Corporation contends that the very fact that the Corporation negotiated with the highest bidders, though they are reluctant, and secured the maximum price itself shows that the Corporation made all possible efforts to sell the unit at optimum price and accordingly sold the same to one Nagaraju, who made down payment of 35% and agreed to pay the balance in three years, treating it as loan. He further contends that since the entire amount of 33.75 lacs has been credited to the account of the petitioner, it is not entitled to question the very sale itself.

Before advertng to the submissions made, it is necessary to refer to Section 29(1) of the Act.

“Rights of Financial Corporation in case of default (1)

Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any installment thereof (or in meeting its obligations in relation to any guarantee given by the Corporation) or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the (right to take over the management or possession or

both of the industrial concern), as well the (right to transfer by way of lease or sale) and realize the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers under sub-section (1), shall vest in the transferee all rights in or to the property transferred (as if the transfer) had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had with respect to the original goods.

(4) (Where any action has been taken against an industrial concern) under the provisions of sub-section (1), all costs (charges and expenses which in the opinion of the Financial Corporation have been properly incurred) by it (as incidental thereto) shall be recoverable from the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the Financial corporation, and the residue of the money so received shall be paid to the person entitled thereto.

(5) (Where the Financial Corporation has taken any action against an industrial concern) under the provisions of sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and be sued in the name of (the concern).”

From a perusal of the material available on record, it is seen that since the petitioner failed to implement the project, the unit was seized on 30.04.1992 and even thereafter on 13.08.1994 when it was asked to pay Rs.2,00,000/- to lift the seizure, it failed to avail the concession given. When the offers were about to finalize, the writ petition was filed nearly after two and half years of the date of seizure.

In view of the submission made by the learned counsel for the respondent-Corporation, it is not open for the petitioner to contend that the sale was in installments, since it received the entire sale consideration. In the absence of any pleading questioning the sale, it is not open for the petitioner to raise all these grounds during the course of arguments.

In the absence of specific pleadings attributing *bona fides*, the petitioner cannot attribute *mala fides* by inference. It is also stated that the unit was handed over to the subsequent purchaser i.e. Mr. Nagaraju and he was due to pay some more installments. That itself cannot be a ground to set aside the sale in favour of said Nagaraju.

The learned counsel for the petitioner, in support of his contentions, placed reliance upon the Judgment of the Supreme Court in *S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar*, the facts of which are as follows:

Proceedings were commenced under Section 29 of the Act for sale of the hotel, which had been mortgaged by the appellant to the Bihar State Industrial Credit and Investment Corporation Ltd. According to the valuation made by the Corporation, the property was worth Rs.2.16 crores and accordingly publication was made offering the hotel for sale for due recovery of the amount of 191.3 lacs including interest payable to the Corporation. The sixth respondent purchased the hotel for Rs. 41 lacs, which was rejected by the Corporation because the bid was too low. Again the property was estimated at Rs.1.58 crores. But, according to the third valuation, the value of the property including the building and land was only 94.81 lacs and accordingly second sale notice was published on “as-is-where-is basis”. The said notice was impugned before the Supreme Court. Pursuant to the second sale notice, offer was received at Rs.95.50 lacs and the same was paid to the Corporation. On a further negotiation, it was fixed at Rs.1 crore and the difference was also paid to the Corporation by the purchaser. Subsequently, tenders were opened. The sixth respondent deposited the sale consideration and his offer was accepted on Sunday calling upon him to pay the amount. Through a letter written on the same day, the appellant and six directors were asked to match the offer of the sixth respondent within 10 days from the date of the issue of the letter, failing which the same would be concluded in favour of the sixth respondent. Questioning the same, a suit was filed on 04.04.2002 and pending the suit, an injunction was sought for and the same was refused by the Sub Judge, wherein the notice was directed to the Corporation. On the next day, a writ petition was filed for the same relief in which the interim order was passed on 09.04.2002,

after hearing the counsel for both the Corporation as well as the appellant and by which a schedule of repayment by installments was prescribed. Subject to payment of the first installment of Rs.10 lacs, possession of the hotel was to be handed over by Corporation to the appellant. Though the appellant paid Rs.10 lacs, the possession was not handed over to him. Meanwhile, the appellant applied for settlement of its outstanding dues. However, the prayer of the appellant for one-time settlement was rejected under settlement policy. The writ petition was dismissed by holding that as the appellant had suppressed the fact that it had filed a suit prior to the initiation of writ proceedings and that the Corporation acted bona fide in taking action under Section 29 of the Act and selling the hotel. The Corporation was also directed to consider the appellant's application for one-time settlement in accordance with law. BICICO was directed to hand over the possession of the hotel to the sixth respondent. The appeal filed by the appellant was dismissed. On further appeal, the Supreme Court held that the period of notice was, in the circumstances, entirely inadequate and the method in which the sale was conducted is also questionable. Three valuations were obtained before the property was sold to respondent No.6. What was valued in July, 2001 as worth Rs.2.16 crores is valued at Rs.94.81 lacs about ten months later, a fall of over Rs.1.50 crores, and the third extraordinary circumstance is that respondent No.6 submitted his offer on the day on which the sale notice was published and made payment of the entire consideration on the same day before the last date for submission of tenders was over and even before its offer could have been accepted. It is unlikely that this would have been done unless respondent No.6 knew (i) the valuation made, and (ii) that its offer would be accepted. Indeed a portion of respondent No.6's offer had already been paid on 07.03.2002 i.e. prior to the sale notice itself. This was pursuant to the earlier infructuous sale notice. In the absence of any satisfactory explanation forthcoming from the authorities to explain these deviations from the norm, the concatenation of inexplicable and unexplained circumstances is sufficient to hold that the sale was unfair and consequently invalid. The facts in the above case are totally inapplicable to the facts of the present case.

The learned counsel for the petitioner has also placed strong reliance on *Karnataka State Industrial Investment & Development Corpn. Ltd. V. Cavalet India Ltd.*, wherein the Supreme Court held that in a matter between the

Corporation and its debtor, a writ Court has no say except in two situations:

- a. there is statutory violation on the part of the Corporation, or
- b. where the Corporation acts unfairly i.e. unreasonably.

The Financial Corporation is always expected to try and realize the maximum sale price by selling the assets by following a procedure which is transparent and acceptable, after due publicity, wherever possible and if any reason is indicated or cause shown for the default, the same has to be considered in its proper perspective and a conscious decision has to be taken as to whether action under Section 29 of the Act is called for.

In *Gajraj Jain's case* (1 supra), it has been held that Section 29 implies that the first charge holder must act in a manner which protects not only its own interest but also the interest of the subsequent charge holder and the mortgagor. This, in turn, implies that the first charge holder is bound to obtain the best possible price for the mortgaged assets and the best possible price must, in the context, mean the fair market value. In breach of sub-sections (1) and (4) of Section 29, after putting the assets to sale by public auction, the Corporation enters into an agreement for sale of the assets with respondent No.4 without ascertaining the market value and realizing the sale proceeds for distribution and even the sale consideration is not realized in full and the Corporation accepts downright payment and balance received by it in the form of promise to it by the purchaser to pay the dues of the Central Bank of India, which is not a party to the agreement, the same cannot be envisaged as contemplated under Section 29(1)(4) of the Act and in the absence of any reason even for the Corporation did not insist of downright payment of entire amount, failed to protect the interest of the Central Bank of India which is having the second charge on the assets transferred and accordingly set aside the sale. The facts of the above case are also not applicable to the facts of the instant case.

In spite of the Corporation filing additional counter-affidavit in July 1995 stating that the proposal of K. Naga Raju to purchase the assets of the petitioner for Rs.33.75 lacs has been accepted by it, subject to result of the writ petition, the purchaser changed the constitution from proprietary to private limited company

in the name and style of M/s Vamsi Krishna Cements Private Limited and possession of assets would be delivered to it. The deficiency of non-impleadment of purchaser has been brought out to the notice of the petitioner. Yet, the petitioner persisted in its default in impleading the subsequent purchaser K. Nagaraju or Vamsi Krishna Cements when he is seeking to set aside the sale. Nearly after 11 years, the petitioner filed W.P.M.P, during the course of arguments, seeking amendment of prayer to declare the sale and consequential transfer of petitioner's company along with its non-mortgaged raw material, current assets and other assets, as illegal and arbitrary. The said petition was dismissed vide separate order today.

Admittedly, in this case, the Corporation has valued the property at Rs.26 lacs and odd and the same was advertised in the newspapers. In further negotiations, best possible price was secured and accordingly the entire amount was credited to the account of the petitioner. In view of the same, it can safely be held that the petitioner has received the entire sale consideration. Moreover, the petitioner has not impleaded the successful bidder, who has paid the entire sale consideration and taken possession of the unit. Therefore, the petitioner is not entitled to any relief.

The writ petition fails and is accordingly dismissed.

09.03.2006

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